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Supreme Court, U.S.
FILED
DEC 8 1997
CLERK

No. 97-451

# In the Supreme Court of the United States

OCTOBER TERM, 1997

FIRST VIRGINIA BANK, PETITIONER

*v.*

UNITED STATES OF AMERICA
AND UNITED STATES DEPARTMENT OF STATE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the Hatch Act Reform Amendments of 1993, which provide for garnishment of a federal employee's pay, also allow commercial judgment debtors to seek recovery from the federal treasury if the government incorrectly failed to garnish an employee's wages and the employee is no longer on the federal payroll.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 110 F.3d 75. The opinion of the district court (Pet. App. 13a-26a) is reported at 920 F. Supp. 213.

### JURISDICTION

The judgment of the court of appeals was entered on April 11, 1997. A petition for rehearing was denied on June 12, 1997. Pet. App. 27a-28a. The petition for a writ of certiorari was filed on September 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Hatch Act Reform Amendments of 1993 (Act) provide that "pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person." 5 U.S.C. 5520a(b). The Act defines "pay" as "basic pay, premium pay * * * and any other compensation paid or payable for personal services, whether such compensation is denominated as wages, salary, commission, bonus pay or otherwise." 5 U.S.C. 5520a(a)(4). The Act further defines "legal process" as "any writ, order, summons, or other similar process in the nature of garnishment, that * * * (A) is issued by a court of competent jurisdiction * * * and (B) orders the employing agency of such agency to withhold an amount from the pay of such employee, and make a payment of such withholding to another person." 5 U.S.C. 5520a(a)(3).

In 1982, petitioner obtained a judgment in the District of Columbia Superior Court against Vera Randolph, an employee of the State Department. Pet. 1-2. In early 1994, petitioner revived that judgment and obtained a writ of attachment against the federal government, relying on substantive District of Columbia garnishment law and on 5 U.S.C. 5520a(b). The State Department then began garnishing a portion of Randolph's salary. Pet. 2. In November 1994, Randolph notified the State Department that she had filed a motion to quash the garnishment. Pet. App. 3a. Based on the State Department's interpretation of D.C. Code Ann. § 16-573 (1997),[1] the Department

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[1] D.C. Code Ann. § 16-573(b) (1997) provides:

> Upon written notice of any court proceeding attacking the attachment or the judgment on which it is based, the

stopped withholding sums from Randolph's wages and stopped making payments to petitioner. At that time, approximately $4,368.25 of Randolph's debt remained unpaid.[2] Shortly thereafter, Randolph retired. Pet. App. 3a, 14a. She received a final paycheck, a lump sum payment for her unused annual leave, and an "early out" bonus. The government no longer holds any pay belonging to Randolph. *Ibid.* Moreover, although Randolph receives retirement benefits, those benefits are not included in the definition of pay for purposes of commercial garnishment. See 5 U.S.C. 5520a(a)(2) and (4).

2. In April 1995, petitioner moved for judgment of recovery against the government, seeking a monetary award in the amount that petitioner claimed the State Department had incorrectly failed to withhold from Randolph's salary. Petitioner relied on provisions of District of Columbia law providing that private employers are subject to strict liability when, after receiving a garnishment order, they wrongfully fail to pay a judgment creditor the required percentage of an employee's pay. D.C. Code Ann. §§ 16-573, 16-575 (1997).

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employer shall make no further payments to the judgment creditor or his legal representative until receipt of an order of court terminating the proceedings; except that, in the case of child support judgments, the employer shall continue to withhold the payments from the judgment debtor until receipt of an order of the court terminating the withholding.

[2] At the conclusion of the district court proceedings, petitioner acknowledged that most of the debt had been paid. Petitioner therefore seeks only the outstanding principal, $75.71, and costs, $310.00, for a total of $385.71. See Pet. App. 4a.

The government removed petitioner's action to federal district court. That court granted summary judgment in favor of petitioner and awarded $385.71 in compensatory relief. The court rejected the government's argument that, when a commercial debtor moves to quash a writ of attachment, D.C. Code Ann. § 16-573(b) (1997) relieves the debtor's employer of an obligation to continue garnishing the debtor's wages. Pet. App. 18a-19a. Instead, the court held, that provision relieves employers only of their duty to pay the withheld wages immediately to the judgment creditor. *Ibid.* The court also concluded that the Act waived the government's sovereign immunity from liability for amounts of pay that the government incorrectly fails to withhold. *Id.* at 20a-25a.

3. The court of appeals reversed. Pet. App. 1a-12a. As a threshold matter, the court of appeals first determined that jurisdiction in this case does not rest on the "little Tucker Act," 28 U.S.C. 1346(a)(2), and that therefore the District of Columbia Circuit, rather than the Federal Circuit, had jurisdiction over the appeal. Pet. App. 4a-7a. Turning to the merits, the court then held that Section 5520a(b) does not render the United States liable in damages to a judgment creditor for an erroneous failure to garnish a federal employee's wages once that employee has left the federal payroll. *Id.* at 11a.[3]

The court of appeals explained that the statutory language is "nearly decisive" on that issue, because

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[3] The government did not challenge on appeal the district court's interpretation of the D.C. Code. As a result, the court of appeals "assume[d] the State Department should have continued withholding a percentage of Randolph's wages despite her motion to quash." Pet. App. 8a.

Section 5520a(b) makes clear that "it is only the employee's 'pay' that is made 'subject to legal process.'" Pet. App. 8a (citing 5 U.S.C. 5520a(b)). Because Randolph is no longer employed by the State Department, the court held, "there is no longer any 'pay from an agency to an employee' that can be subject to legal process." *Ibid.* The court further noted that any amount recovered by petitioner would come not from the annual appropriation for State Department salaries and expenses, but from the "general appropriation of funds" set aside for the purpose of satisfying judgments against the United States. *Ibid.* (citing *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990); 31 U.S.C. 1304). Thus, the court concluded, what petitioner seeks is, at bottom, an award of compensatory damages under a theory of tort liability. *Id.* at 8a-10a. Because the court found that the Hatch Act Reform Amendments provide petitioner with no cause of action to seek such relief, it did not reach the separate issue of whether the United States had waived its sovereign immunity from this action. *Id.* at 10a-12a.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Section 5520a(b) creates no cause of action against the United States to redress a federal agency's failure to garnish an employee's wages if the agency no longer has any control over those wages. Instead, Section 5520a(b) provides only that "*pay* from an agency to an employee is subject to legal process in the same manner and to the same extent as if the

agency were a private person." 5 U.S.C. 5520a(b) (emphasis added). As the court of appeals correctly determined (Pet. App. 8a), once a federal employee has retired from federal service and has received his or her final paycheck, there is no longer any "pay * * * to an employee" that can be "subject to legal process," no matter how that "process" is defined. For that reason alone, petitioner's claim is without merit.

Petitioner seeks to escape the plain language of Section 5520a(b) by contending that its motion for judgment of recovery was "merely ancillary to * * * the original writ" of attachment and therefore falls within the scope of "'legal process,' as defined in § 5520a." Pet. 7.[4] That argument misses the mark. Even if petitioner's construction of the term "legal process" were correct—and, as the court of appeals explained (Pet. App. 9a-10a), it is not—that construction could benefit petitioner only to the extent that the statutory subject of petitioner's "process," an employee's "pay," is still available. Once an employee has left the federal workforce and no longer receives "pay," however, that statutory subject no longer exists, and Section 5520a(b) provides a judgment creditor in petitioner's position with no cause of action against the federal treasury.[5]

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[4] By contrast, in the court of appeals, petitioner contended that "[t]he proceeding pursuant to the Motion was * * * in essence a tort action, different in kind from the original garnishment action." Petitioner's Supp. C.A. Br. 2; accord Pet. App. 9a-10a.

[5] Petitioner's reliance (Pet. 6) on a regulation of the Office of Personnel Management (OPM), see 5 C.F.R. 582.305(g), is also unavailing. As the court of appeals recognized, that regulation "does not purport to set forth an interpretation of § 5520a(b) and it is, in any event[,] ambiguous." Pet. App. 9a

In any event, the doctrine of sovereign immunity—which the court of appeals did not reach because it found that Congress has provided no cause of action entitling petitioner to the relief it seeks—independently justifies the court's judgment. "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996). Thus, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 2096-2097; accord *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Department of Army* v. *FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) ("An Act of Congress is not unambiguous, and thus does not waive immunity, if it will bear any 'plausible' alternative interpretation.") (citing *Nordic Village*, 503 U.S. at 34).[6]

Here, the United States has waived its sovereign immunity only to the extent that a federal agency

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n.1. Moreover, in light of the issues raised in this case, OPM recently issued a formal proposal to amend its regulations to make clear that they do not "support * * * the conclusion that Congress has waived the Federal Government's sovereign immunity in a manner that would make the Federal Government liable for damages as a result of a failure to comply with legal process." Notice of Proposed Rulemaking, Processing Garnishment Orders for Child Support and Alimony and Commercial Garnishment of Federal Employees' Pay, 62 Fed. Reg. 31,763, 31,763 (1997); see also *ibid.* (proposing similar change to regulations relating to garnishment for child-support purposes).

[6] Although it now contends otherwise, see Pet. 10, in the court of appeals, petitioner accurately characterized "[t]he remedy sought in the instant action" as "damages for the government's admitted error." Petitioner's Supp. C.A. Br. 4.

may be required to garnish the wages of an employee currently on the federal payroll, not to the further extent that it must pay creditors an amount in damages equal to what it should have withheld, but did not withhold, from a former employee's salary. That distinction has significant practical consequences for the public fisc. In the former context, the government's obligations are limited to what it has already agreed to pay a federal employee, and the only effect of the garnishment order is to alter the payee of the government's check. See generally *Nationwide Investors* v. *Miller*, 793 F.2d 1044, 1046 (9th Cir. 1986) ("the government has nothing at stake beyond the address of its payroll check"). By contrast, the type of remedy that petitioner seeks would substantially increase the government's obligations, because it would force the government to pay a creditor an amount that it has already paid its former employee. Because Section 5520a(b) does not "unambiguously" subject the federal treasury to such additional obligations, see *Lane*, 116 S. Ct. at 2097, petitioner's construction of that provision would be wrong even if the provision were ambiguous with respect to the issue presented here.[7]

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[7] The petition does not cite, and presents no claim under, the Administrative Procedure Act (APA), 5 U.S.C. 702, nor did petitioner present any such claim in the court of appeals. For that reason, petitioner's reliance (Pet. 10) on cases interpreting the APA's remedial provisions—*Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), and *Aetna Casualty & Surety Co.* v. *United States*, 71 F.3d 475, 479 (2d Cir. 1995)—is misplaced. The petition also presents no claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See Pet. App. 10a n.2. Finally, despite petitioner's contrary position (see Pet. 8-9), which it did not present to the court of appeals and which

2. Petitioner concedes that "the decision of the Court of Appeals is the only known interpretation of 5 U.S.C. § 5520a." Pet. 4. Petitioner nonetheless contends that this case would be an appropriate vehicle for addressing the meaning of a different statute: 42 U.S.C. 659, which concerns the garnishment of a federal employee's pay to satisfy child-support or alimony obligations, rather than obligations to commercial creditors. See Pet. 4-6, 12. That contention is without merit. First, it is somewhat anomalous for petitioner, a bank, to focus its request for certiorari on a purported need for this Court to interpret a child-support statute that is not at issue in this case and has no obvious bearing on petitioner's commercial interests. Moreover, although 5 U.S.C. 5520a and 42 U.S.C. 659 (Supp. II 1996) contain some similar language, they differ in material respects. For example, the child-support provision provides for garnishment by the federal government of a range of "moneys payable to an individual," see 42 U.S.C. 659(h) (Supp. II 1996), whereas Section 5520a confines commercial-debt garnishment to the more limited category of "pay," 5 U.S.C. 5520a(b). Thus, unlike the commercial-debt statute, see 5 U.S.C. 5520a(a)(2) and (4); see also pp. 2-3, *supra*, the child-support statute allows garnishment of, for example, a former employee's federal retirement benefits, see 42 U.S.C. 659(h)(1)(A) (Supp. II 1996).[8]

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that court did not address, the compensatory relief that petitioner seeks against the federal treasury bears no resemblance to a judicial fine imposed in contempt proceedings.

[8] The petition presents no argument that the government has either the authority or the obligation to garnish Randolph's retirement benefits.

Petitioner also contends (Pet. 5) that the decision below is "at odds with" the Eleventh Circuit's decision in *Loftin* v. *Rush*, 767 F.2d 800 (1985), which addressed the extent to which Congress waived sovereign immunity in enacting the child-support garnishment statute.[9] Even if that statute were sufficiently similar to Section 5520a(b) to make it meaningful to speak of any "conflict" in this context, *Loftin* is entirely consistent with the decision below, as the court of appeals recognized. See Pet. App. 10a-11a & n.3. Unlike the debtor in this case, the federal employee in *Loftin* was still on the federal payroll, and the government therefore still had control over funds that could be garnished. That fact was essential to the reasoning of the *Loftin* court, which emphasized that, in enacting the child-support statute, "Congress determined that the government could act as a collection agent in certain cases, but created no right of action against the government for moneys owed by its employees to third parties." 767 F.2d at 809; see also Pet. App. 11a (noting that, under *Loftin*, 767 F.2d at 809, the government's garnishment obligations under the child-support statute are limited to "'moneys due a federal employee at the time' the government is served with legal process"). Although the Eleventh Circuit ultimately ordered the government to pay the child-support creditor "the money it should have withheld," 767 F.2d at 810, the court of appeals in this case explained that, in *Loftin*, "the government could

[9] Congress recently enacted a variety of amendments (many of them technical) to the child-support garnishment provisions at issue in *Loftin*. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362(a) and (d); 110 Stat. 2242, 2247. Those amendments do not affect the commercial-debt provisions at issue in this case.

recoup the judgment by making deductions from the [employee's] future Navy paychecks, something that could not be done here because Randolph is no longer employed at the State Department." Pet. App. 11a n.3.

Finally, petitioner claims (Pet. 4-5) that the decision below "directly contradicts" *United States* v. *Morton*, 467 U.S. 822 (1984), which, like *Loftin*, addressed the child-support statute; petitioner relies principally on this Court's statement that "Congress intended the Government to receive the same treatment as a private employer with respect to garnishment orders." *Id.* at 831. Petitioner's claim of an inconsistency with *Morton* is without merit. This Court made the quoted statement in the course of rejecting arguments that Congress had intended to impose a form of liability on the government that would *not* be imposed on a private employer. *Id.* at 832-833. *Morton* has no bearing, however, on whether a creditor may seek relief from the federal treasury when the government fails to comply with a writ of attachment. More generally, "*Morton* does not stand for the proposition that the government is to be treated, in all cases, as if it were a private employer. *Morton* simply upholds the right of the government to be treated *as well as* a private employer." *Loftin*, 767 F.2d at 807.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997